

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| BUNN ENTERPRISES, INC., | . | |
| et al., | . | |
| | . | |
| PLAINTIFFS. | . | CASE NO. 2:13-CV-357 |
| | . | |
| vs. | . | COLUMBUS, OHIO |
| | . | APRIL 24, 2013 |
| OHIO OPERATING ENGINEERS | . | 1:30 P.M. |
| FRINGE BENEFIT PROGRAMS, | . | |
| | . | |
| DEFENDANT. | . | |
| | . | |

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER PROCEEDINGS
BEFORE THE HONORABLE ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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| FOR THE PLAINTIFFS: | RONALD L. MASON, ESQ. |
| | AARON TULENCIK, ESQ. |

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| FOR THE DEFENDANT: | BRYAN C. BARCH, ESQ. |
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1 WEDNESDAY AFTERNOON SESSION

2 APRIL 24, 2013

3 - - -

4 THE COURT: Would counsel please identify themselves
5 for record beginning with counsel for the plaintiff.

6 MR. TULENCIK: Aaron Tulencik, T-U-L-E-N-C-I-K,
7 counsel for the plaintiffs.

8 MR. MASON: Ronald Mason, M-A-S-O-N, counsel for the
9 plaintiffs.

10 MR. BARCH: Brian Barch, counsel for the defendant.

11 MR. ORRAND: Raymond Orrand, administrator.

12 THE COURT: Could you spell your last name, please?

13 MR. ORRAND: O-R-R-A-N-D.

14 THE COURT: We're here for -- pursuant to 65.1 of
15 the local rules, and Rule 65(b) under Federal Rules of
16 Civil Procedure.

17 Mr. Mason and Mr. Tulencik, who is going to speak on
18 behalf of the plaintiff?

19 MR. TULENCIK: I will, Your Honor.

20 THE COURT: This is your motion. What is the basis
21 for the irreparability first, and the immediacy?

22 MR. TULENCIK: The basis for irreparable harm is the
23 fact that certain employees have either already lost
24 insurance benefits, even though they were eligible, and
25 certain employees will very soon in the future lose

1 insurance benefits even though they're otherwise eligible,
2 based upon the disputed contributions to a retired
3 employee, Mr. Newlon.

4 There is a dispute over the amount owed to the fund
5 with respect to Mr. Newlon's contributions. And in doing
6 so, any future contributions - and past contributions, I
7 should add - that the plaintiff has paid into the fund has
8 been credited towards that dispute as opposed to up-to-date
9 contributions for certain employees on which those benefits
10 were made. And in doing that, those employees are not
11 being credited for the hours worked.

12 THE COURT: Okay. Why can't certain of these
13 alleged injuries be redressed by monetary damages?

14 MR. TULENCIK: Case law suggests that it's not --
15 simply losing insurance benefits isn't oh, well, we'll just
16 give them their premiums for out-of-pocket expenses. They
17 can suffer -- one court points out that the purpose of
18 insurance is to cover unexpected costs. You don't know
19 what those unexpected costs may be, therefore, it is not a
20 monetary harm. And you are suffering certainly anxiety
21 over what happens if you're injured --

22 THE COURT: Plaintiff Newlon seeks 14,000 in pension
23 payments; is that right?

24 MR. TULENCIK: Around that. We don't know the exact
25 amount.

1 THE COURT: That amount can be ascertained. And if
2 the defendant has to pay that amount, then Newlon is made
3 whole, correct?

4 MR. TULENCIK: Newlon would be made whole, correct.

5 THE COURT: Now, Plaintiffs Bunn, Karcher, Lantz,
6 Morgan -- is it Schau?

7 MR. TULENCIK: My understanding is it's Schau.

8 THE COURT: Schau. -- and Welch had their health
9 insurance benefits discontinued. That's what your claim
10 is?

11 MR. TULENCIK: That's our claim, yes, sir.

12 THE COURT: The defendants have responded in a
13 pleading filed today that certain of these defendants never
14 had their insurance benefits discontinued. Am I right
15 about that?

16 MR. BARCH: Correct. It's either an issue of that,
17 or basically some of them are just not in a position where
18 they would receive benefits anyway. Now, the first thing I
19 would mention is Chad Karcher, although mentioned in the
20 plaintiff's motion for temporary restraining order, they're
21 not named as a plaintiff in this case. So they're not --
22 so obviously, since they're not a party, they're not really
23 entitled to injunctive relief here.

24 I think the best way I can describe it is kind of go
25 one by one through -- there's seven plaintiffs, one of

1 which is Bunn Enterprises. That leaves us six plaintiffs
2 we're talking about whether there may be a potential issue
3 of health insurance.

4 THE COURT: I'm going to give you your opportunity,
5 obviously, to respond to Mr. Tulencik. But what I want to
6 know first of all, as a factual matter, is which of these
7 plaintiffs never had their health insurance benefits
8 discontinued.

9 MR. BARCH: Well, there's only -- right now, I mean
10 there's really only been -- among the plaintiffs that had
11 been listed in this complaint, we're only talking about
12 one, which is Mark Morgan.

13 THE COURT: So Morgan's was never discontinued?

14 MR. BARCH: I apologize. He is the one that had had
15 his benefits discontinued.

16 THE COURT: But Bunn, Karcher, Lantz, Schau and
17 Welch never had their benefits discontinued?

18 MR. BARCH: With regard to Karcher, his was
19 discontinued for one month and he did incur some
20 out-of-pocket expenses which were later reimbursed by the
21 health and welfare benefits once there was money --

22 THE COURT: So he's whole?

23 MR. BARCH: He's whole at this point.

24 THE COURT: As we sit here right now, Mr. Karcher
25 has health insurance benefits?

1 MR. BARCH: To the best of my knowledge, he does. I
2 should also note that Mr. Karcher is not an employee of
3 Bunn Enterprises.

4 THE COURT: How about Bunn?

5 MR. BARCH: He has health insurance benefits until
6 July 31st of 2013. The last time he lost health insurance
7 benefits, according to the records I was able to find in
8 the very short amount of time I had available to me, was
9 2003.

10 THE COURT: Isn't it possible -- now, I don't
11 purport to understand how your business operates, but in
12 this information/technology era, there has to be a button
13 that you can push to tell whether somebody is or is not
14 insured. I mean, that's not -- it doesn't seem to be a
15 difficult inquiry.

16 MR. BARCH: Well, with Karcher -- and I understand
17 what you're saying. We certainly have a computer database,
18 basically, which allows us to bring up the records. But
19 with that said, in order to verify the eligibility, we
20 still have to make sure -- we have to look at the
21 contributions that have been made by the employer to be
22 absolutely certain we know what the eligibility status is
23 of that member slash operator slash employee of Bunn
24 Enterprises.

25 THE COURT: Mr. Barch, I heard every word you said.

1 I have no idea what you just told me.

2 Let me ask the question a different way. I just
3 want kind of a yes or no answer. Is Mr. Lantz insured at
4 this point?

5 MR. BARCH: Mr. Lantz is insured. He has been
6 insured since February 2008. Now, he is retiring as
7 April 30th, 2012, but he has made the option of
8 basically -- because once you retire, then, in order to
9 remain within the health and welfare benefits plan, you
10 have to choose -- you have to have a deduction out of your
11 pension check in order to maintain eligibility. He has
12 chosen that option.

13 THE COURT: Is Mr. Morgan insured?

14 MR. BARCH: Mr. Morgan is not insured at this point.
15 His eligibility expired on January 31st of this year.

16 THE COURT: Because?

17 MR. BARCH: There's not enough money at this point
18 to cover --

19 THE COURT: He's the object of this lawsuit?

20 MR. BARCH: Correct.

21 THE COURT: How about Mr. Schau? Is he insured?

22 MR. BARCH: Mr. Schau -- now, the complicated thing
23 with Mr. Schau is I believe he's a member of a different
24 union, Local 181. Now --

25 THE COURT: So is the short answer no?

1 MR. BARCH: Well, we don't know whether -- he's not
2 insured by us, but he's not a member of Local 18 either.
3 He is a member of a different local.

4 Now, there, Bunn has paid hours for Michael Schau.
5 But with that said, assuming for the moment that he is
6 eligible for health and welfare benefits under Local 18,
7 basically, he would not be a participant because he hasn't
8 worked enough hours.

9 THE COURT: How about Mr. Welch?

10 MR. BARCH: Mr. Welch is also a member -- now he is
11 a member of Local 841. He was a member of Local 18, but he
12 transferred to Local 841 in July of 2012. Now, Bunn
13 Enterprises did make contributions on Mr. Welch's behalf to
14 Local 18. And basically what has happened here is back in
15 December, Mr. Welch signed what's called a reciprocity
16 agreement, which means that he requested that Local 18, in
17 the future, transfer any payments made by any of his
18 employers for health and welfare benefits, that they be
19 transferred over to a different local which I believe is a
20 local in Indiana located in Terre Haute. I couldn't tell
21 exactly which one because the handwriting on the form was
22 not readable.

23 Now, with that said, we have received payments from
24 Bunn Enterprises on behalf of Mr. Welch, but according to
25 our records, they've been transferred to Local 841.

1 THE COURT: So is he insured: Mr. Welch?

2 MR. BARCH: He's not insured through us, but he's
3 also not a participant in our health and welfare plan
4 either. That would be something that 841 would have to
5 confirm.

6 THE COURT: Okay. So Mr. Newlon, then, is the only
7 one in that -- in the category of someone who has lost
8 pension payments. Is that right, Mr. Tulencik?

9 MR. TULENCIK: Yes. He has only lost pension
10 payments which we believe he is rightfully due and are
11 being withheld.

12 THE COURT: Now, let's turn our attention to these
13 other plaintiffs. You've heard what Mr. Barch has said
14 about whether they had health insurance benefits. So
15 Mr. Bunn has until -- is it July of '13?

16 MR. TULENCIK: July 31, 2013, his benefits will run
17 out per their policy of not crediting his payments.

18 THE COURT: So the only reason they will run out in
19 '13 is that they haven't credited the payments?

20 MR. TULENCIK: Correct.

21 THE COURT: But because we'll have a PI hearing
22 before then and he is presently covered, there's no
23 immediacy of harm?

24 MR. TULENCIK: If, in fact, we do receive a decision
25 by then, that would be correct, Your Honor.

1 THE COURT: Let me assure you that you will receive
2 a decision by then.

3 MR. TULENCIK: Okay.

4 THE COURT: And there's no irreparability because at
5 the present time he's covered?

6 MR. TULENCIK: At the present time Mr. Bunn is
7 covered.

8 THE COURT: Let's move on to Mr. Karcher. He has
9 disability for one month left?

10 MR. TULENCIK: Yes. And he is not a named
11 plaintiff.

12 THE COURT: Karcher is not?

13 MR. TULENCIK: Not a named plaintiff, sir.

14 THE COURT: So we can skip over Mr. Karcher?

15 MR. TULENCIK: Correct.

16 THE COURT: How about Mr. Lantz? He is insured?

17 MR. BARCH: That is correct.

18 THE COURT: So you take him out of the calculus.

19 MR. TULENCIK: It's my understanding, if he does not
20 retire, his benefits would expire May 31, 2013.

21 MR. BARCH: That would not be our understanding.

22 THE COURT: What is your understanding, Mr. Barch?

23 MR. BARCH: According to our records, Mr. Lantz --
24 again, he retires on April 30th of this year, five days
25 from now. It's our understanding that basically he has

1 chosen -- upon his retirement, he has chosen to self-pay on
2 his health and welfare benefits through a deduction from
3 his pension check. As long as he does that, he will retain
4 and continue on with eligibility in our health and welfare
5 plan.

6 MR. TULENCIK: What if he does not retire and
7 continues working for Bunn?

8 MR. BARCH: Well --

9 MR. TULENCIK: The document attached to your motion
10 would seem to indicate end date of May 31, 2013.

11 MR. BARCH: Well -- May 31, 2013?

12 MR. TULENCIK: Yes.

13 MR. BARCH: I apologize. It should be April 30th,
14 2013.

15 THE COURT: That's when his benefits run out?

16 MR. BARCH: That's when he retires. That's his
17 retire date.

18 THE COURT: That's Mr. Lantz?

19 MR. BARCH: That is correct. As far as if he
20 chooses not to pay in, then it could expire at that point.
21 But that's -- that's entirely speculative. I mean, at this
22 point, he has chosen the self-pay.

23 MR. TULENCIK: I'm simply saying if he does not, in
24 fact, retire and continues working for Bunn, he's going to
25 lose benefits in six days.

1 THE COURT: Is that correct, if he doesn't retire?

2 MR. BARCH: If he does not retire, honestly, I'm not
3 sure about that. I did not have time to research that at
4 this point, to see what his status would be if he refuses
5 to self-pay. But he has already filled out the paperwork
6 for the self-pay, and so at this point, any pension checks
7 that he receives from the pension fund will have health
8 insurance -- will have a deduction for his health insurance
9 until he fills out a form that says he wants to terminate
10 that.

11 THE COURT: How about Morgan, Mr. Tulencik?

12 MR. TULENCIK: He does not have insurance benefits
13 right now.

14 THE COURT: And Mr. Schau? It says he's not insured
15 by the defendant but he is a member of a different local.
16 Are you alleging that in Mr. Schau's case that had Bunn
17 Enterprises paid what defendants alleged he owed, that he
18 would be insured?

19 MR. TULENCIK: It's my understanding if Schau were
20 still working for Bunn, he would not be eligible for
21 insurance because he is not being credited his hours.

22 THE COURT: Is that right, Mr. Barch?

23 MR. BARCH: Mr. Schau is a member of Local 181. I
24 mean, I could not tell you what his eligibility is with
25 Local 181. It would be based on whatever their eligibility

1 standards are.

2 MR. TULENCIK: My client is losing employees because
3 they're losing health insurance.

4 MR. MASON: Who wants to go work for a company that
5 you can't get your health insurance credit because the
6 pension fund is taking the money that they would get credit
7 for their health insurance and putting it to a debt that we
8 question?

9 THE COURT: So it's not an inquiry driven by the
10 local, the membership in the particular local, but it's an
11 inquiry more driven by where you work?

12 MR. BARCH: Well, Your Honor, they're -- as far as
13 it relates to these plaintiffs, within the context of -- it
14 wasn't for the fact that we're applying contributions to
15 late charges and delinquent contributions, that because of
16 that these people don't have health insurance and they're
17 entitled to injunctive relief. When you're talking about a
18 Michael Schau or a David Welch, really that issue is
19 irrelevant. Even if we were applying the contributions in
20 a way that they want it, they're eligibility would not --
21 whether they're eligible or not eligible would not be
22 affected by how we apply those payments.

23 MR. TULENCIK: I mean, if Bunn is making payments
24 based on hours they work and you apply those payments to
25 Mr. Newlon's delinquent contributions, they're not being

1 credited for those hours.

2 MR. BARCH: There you're talking about Mr. Newlon.
3 I was referring to Mr. Schau and Mr. Welch.

4 MR. TULENCIK: Correct. But if we make
5 contributions for Mr. Schau for hours that Mr. Schau
6 worked, you're not crediting Mr. Schau for those hours.
7 You're putting those hours toward the delinquent
8 contribution of Mr. Newlon.

9 MR. BARCH: That's true. But, as far as whether
10 he's eligible or not, it's not necessarily dependent upon
11 the application. A lot of it also depends on what his
12 eligibility is as relates to -- as relates to 181.

13 MR. TULENCIK: Correct. I'm saying my client is
14 losing employees because of the way you're administering
15 your policy.

16 MR. BARCH: I don't think that's the issue at hand
17 here, I don't think.

18 MR. MASON: It is mine.

19 THE COURT: Gentlemen, I'm trying to really get an
20 understanding of how this works and I need you to talk to
21 me.

22 MR. BARCH: I understand, Your Honor.

23 THE COURT: I'm the only decision maker in the room.

24 The last one is Mr. Welch. See, Mr. Welch and
25 Mr. Schau seem to be in the same situation. They are not

1 members -- they're members of different locals --

2 MR. BARCH: Correct.

3 THE COURT: -- if I understand the defense position.

4 And then therefore they aren't covered because they're
5 members of different locals.

6 MR. BARCH: Correct.

7 THE COURT: The plaintiffs are taking a position
8 that even if they weren't members of different locals and
9 were working at Bunn, if they worked at Bunn, because of
10 the alleged payments that Bunn has not made, these
11 gentlemen, Messrs. Schau and Welch, would not be covered.
12 That's what you all are alleging.

13 MR. TULENCIK: Based on how they are administering
14 their payments, that is correct.

15 THE COURT: And you disagree with that?

16 MR. BARCH: Yes. Let me put it to you -- let me
17 kind of go back through it again. Again, Mr. Welch signed
18 a reciprocity agreement on December 17th, 2012, and we
19 received it February 28th, 2013.

20 Now, last year we received payments for Mr. Welch
21 for health and welfare benefits. And to be clear, what a
22 reciprocity agreement means is that he has asked us to
23 basically apply any payments which we receive on his behalf
24 and transfer it over to his home local. Okay? And the
25 agreement also states that the health and welfare plan that

1 covers him is the one that is offered by Local 841.

2 Now, over four different months for 2012, Bunn has
3 made contributions, including contributions for the hours
4 for Mr. Welch. All the payments -- according to our
5 records, all the payments we received on behalf of
6 Mr. Welch have been transferred to 841. So, if his
7 eligibility is in question here, then it's an eligibility
8 that -- an eligibility issue that relates to 841, not to
9 us.

10 MR. TULENCIK: Your Honor, if I may.

11 THE COURT: Yes.

12 MR. TULENCIK: And the argument we're making is --
13 and I understand what Mr. Barch is saying: because they're
14 members of different locals, that money gets credited to
15 them. Had they remained members of Local 18, that money
16 was not credited towards them.

17 THE COURT: Stop right there. Is that correct?

18 MR. BARCH: Well --

19 THE COURT: I just want to keep this simple because
20 I don't want the record to be cluttered and I want answers
21 to my questions directly. Now, if Schau and Welch had
22 remained members of Local 18, would they be insured today?

23 MR. BARCH: I would have to go back and look and see
24 whether they would be or not. The fact that they signed
25 reciprocity agreements to have the money transferred to 841

1 is what we're operating on today, basically.

2 Bunn Enterprises has made payments to Local 18 and
3 they've been transferred to Local 841 as requested under
4 the reciprocity agreement that Mr. Welch signed.

5 THE COURT: I need to clarify this. So if they're
6 members of Local 841, can they go and work for Bunn
7 Enterprises as members of Local 841?

8 MR. TULENCIK: Yes.

9 THE COURT: So let's say that Welch and Schau, as
10 members of -- was Schau also a member of 841? I know Welch
11 was.

12 MR. BARCH: To the best of my knowledge, he is a
13 member of 181.

14 THE COURT: 181?

15 MR. BARCH: Correct.

16 THE COURT: Let's say that Schau was a member of
17 181, Welch is a member of 841, and they go to work for Bunn
18 today. Are they covered? Are they insured?

19 MR. BARCH: They would not be insured under our
20 health and welfare benefits.

21 THE COURT: If they're members of Local 18, are they
22 insured?

23 MR. BARCH: But that also depends on the number of
24 hours. If you want to add in --

25 THE COURT: Go ahead, Mr. Orrand.

1 MR. ORRAND: I can keep it simple. The way
2 reciprocity works is the contractor sends money to us, we
3 send it back to the home local the same day. And whatever
4 eligibility rules apply to that local -- we have different
5 eligibility rules. They vary across the country. But
6 being members of other locals, when that money comes in, we
7 transfer it out within a week; it goes back to their home
8 local.

9 THE COURT: Okay. So that means that as we sit here
10 today, Schau and Welch are not covered?

11 MR. ORRAND: Not through Local 18, because they are
12 members of other locals.

13 THE COURT: But they're covered through Local 841 in
14 the case of Welch, and 1181, or whatever it is, in the case
15 of Schau.

16 MR. ORRAND: They would have to contact those locals
17 to find out.

18 THE COURT: So we don't know. We don't know.

19 MR. BARCH: Right.

20 THE COURT: Do you have any further information?

21 MR. TULENCIK: No, just what we reiterated before.
22 I understand they're getting paid. Bunn pays them money.
23 It gets credited towards Schau and Welch because they're in
24 different locals. When Bunn makes payments for employees
25 of Local 18, that money does not get credited to those

1 employees. So the moral of the story is don't belong to
2 Local 18 and you will get your money. If you belong to
3 Local 18, you're not going to get credited for your hours,
4 you're not going to get your money, and it's going to go to
5 Mr. Newlon to make up for the quote/unquote contribution
6 dispute which is the reason we're here.

7 MR. ORRAND: May I interject for a second?

8 THE COURT: Go ahead.

9 MR. ORRAND: This has all arisen out of a certified
10 audit we did on the contractor's payrolls. We had audits
11 in the past with no findings. This turned up findings. It
12 somewhat mirrors a credit card debt. If you have a rolling
13 balance on your credit card, it goes to the oldest amount
14 first. The reason we do that is to keep the members that
15 worked for Bunn a year ago, a year and a half ago -- rather
16 than apply the money to the guy who just got hired, a
17 old-timer would get his benefits and the new guy would have
18 to wait until the old balance is brought current, if that
19 simplifies it.

20 MR. MASON: If I could respond to that. What we're
21 dealing with here is an audit that was done on an
22 individual, Mr. Newlon, who was not working -- doing work
23 under the collective bargaining agreement. He was not
24 doing bargaining work. The union has decided that even
25 though he's out mowing the grass, that because he worked

1 for Bunn, they're going to count those as hours worked even
2 though, under the Sixth Circuit case law that's directly on
3 point, it's not considered money that the fund is entitled
4 to. So what has happened is, is the fund, by doing this
5 audit on what we say is improper calculation of his money,
6 is engaged in, for want of a better term, extortion against
7 my client because what they're doing is they're taking all
8 the money of the current workers, applying it to a very
9 questionable debt. This is not where we signed a credit
10 card and we charged it up. This is a very questionable
11 debt.

12 But in order to assert influence against Bunn, to
13 deny Bunn's future workers -- who's going to come from
14 Local 18 and work for Bunn while we have the dispute going
15 on if their pension plan and their health and welfare
16 benefits are going to another person? And the bank of
17 money that they have, it gets credited for their own health
18 insurance, they wind up without health insurance over this
19 disputed claim.

20 So it is a great tactic to use against the company.
21 As a matter of fact, it was acknowledged in their brief
22 that that's exactly what this is. It is a tactic that they
23 are using to force Bunn to pay a debt that Bunn does not
24 actually lawfully owe. It needs workers. We are into the
25 spring and summer for a construction company that has

1 already got contracts, that needs employees. Those
2 employees -- Local 18 covers the entire state of Ohio. So
3 any and all work that Bunn is going to be doing in the
4 state of Ohio, they're going to need referrals from Local
5 18.

6 How are they going to get those employees if they
7 say you -- come to me and say, Ron, do you want to go work
8 for Bunn? I say, What happens to my health insurance and
9 pension money?

10 Well, that's getting credited by somebody else. And
11 by the end of the summer, I'm going to be without health
12 insurance because of the way they're crediting the current
13 employees. That's what's going on here.

14 All we're asking for is saying we have this dispute
15 of \$50,000. Let's litigate it. If we owe it, we'll pay
16 it. But for God's sakes, don't take our current workers
17 and deny them health insurance because you're trying to
18 force us to pay the \$50,000. And that's what's going on.

19 And all we're asking for is -- and we're making the
20 payments. And the courts and the case law say if you're
21 making current payments on current employees, the funds
22 should credit those people those benefits. Whether or not
23 you're in another jurisdiction and you qualify or not,
24 that's all in the basis of the numbers. But don't deny
25 these employees the payments that we're making on their

1 behalf over a disputed debt where we never signed the
2 credit card to begin with.

3 MR. BARCH: May I respond to that argument?

4 THE COURT: Sure.

5 MR. BARCH: Okay. And I'll do it briefly.

6 In a collective bargaining agreement, which Bunn
7 Enterprises signed, there is paragraph 35. And paragraph
8 35 simply states all hours worked by all operators -- and
9 I'm paraphrasing this. It is not a word-for-word quote of
10 paragraph 35. That all hours worked by an operator must be
11 paid. And that includes not only work that's traditionally
12 considered operating work such as operating a crane,
13 operating a bulldozer. It also applies to other tasks,
14 whether it's painting a fence or pulling weeds.

15 And I would say the cases are very well settled.
16 And I don't use that word lightly, but there is a line of
17 cases which clearly states that when an operator -- that
18 any time an operator works, whether it's -- regardless of
19 the task, those hours must be paid. And there's a line of
20 cases which support that. And there's even a case here a
21 few years ago involving the trust funds, which you presided
22 over, where there was a ruling by you which basically
23 states that very thing.

24 And I think this issue has been litigated enough to
25 where it's -- you have M.L. Noe versus R.D. Jones. You

1 have Orrand versus Cheryl Shope. We had a case several
2 years ago, it was the trust funds here versus Keim
3 Concrete. And there are a couple other cases too. In each
4 one of those cases, you had a situation where the
5 defendant, which was the employer, contesting that work
6 that was not done by an operator which was not considered
7 traditional operating work was not covered by the
8 collective bargaining agreement. In each one of those
9 cases the Court had ruled that the employer must pay for
10 all of those hours.

11 MR. TULENCIK: Your Honor, that paraphrase of the
12 contract was very disingenuous, and also the case law cited
13 is not the case law in the Sixth Circuit. First of all,
14 the paragraph states employees who perform work under this
15 agreement, the only way they're performing work under this
16 agreement is the work stated and outlined in the agreement.
17 And that's made very clear.

18 The cases he cites to that are here in the southern
19 district were from 2002 and 1992. And the Sixth Circuit --

20 THE COURT: Mine must have been the 2002 case.

21 MR. TULENCIK: I believe it was Judge Sargus.
22 Michigan Laborers Health Care Fund versus Grimaldi, which
23 was a Sixth Circuit case, made it very clear that it's
24 covered work.

25 MR. BARCH: Your Honor, *Grimaldi* dealt with the

1 issue of a particular statute: 29 U.S.C. 1059. That was a
2 case in which there is a question mark as far as the number
3 of hours that were worked by -- that was worked by the
4 operators. In other words, going back to that statute,
5 that statute basically states that the employer has a duty
6 to provide -- to maintain specific records which allows an
7 auditor for a trust fund to be able to specifically
8 calculate the hours worked by an operator, which is an
9 entirely separate issue from the issue of whether or not
10 work -- whether non-operator work is covered; an entirely
11 separate issue.

12 THE COURT: All right. Okay. I got it. I'm going
13 to take a brief recess. It's 2:20 now. We're going to
14 stand in recess until -- well, actually it's 2:22. It will
15 be short; until 2:30.

16 (Recess taken from 2:21 p.m. to 2:28 p.m.)

17 THE COURT: Upon consideration of the arguments of
18 counsel and the papers that had been filed, the Court
19 denies the motion for a TRO with respect to Plaintiff
20 Newlon inasmuch as his alleged wrongs can be redressed by a
21 monetary award. And the law is well settled that an injury
22 typically is not irreparable if it's compensable by a
23 monetary award. Mr. Newlon seeks approximately \$14,000 in
24 pension payments that had not been paid. We can ascertain
25 the exact amount, and therefore the TRO with respect to him

1 is denied.

2 The TRO with respect to Mr. Bunn is also denied
3 inasmuch as he is insured at least until July of this year.
4 Mr. Karcher is not a plaintiff in this case. But with
5 respect to Messrs. Lantz, Morgan, Schau and Welch, the TRO
6 is granted. With respect to Schau and Welch, it's granted
7 if either of them works for Bunn in the interim, and it's
8 granted with respect to Messrs. Lantz and Morgan.

9 Now, that TRO I'm going to leave in place for
10 approximately ten days. We need to divine a day to have
11 the preliminary injunction hearing. So I could have it --
12 how long do you think this will take? I start a trial on
13 Monday, and it's going to last probably through the week,
14 I'm thinking.

15 MR. MASON: Monday the --

16 THE COURT: Monday the 29th. I think the easiest
17 date might be the 6th.

18 MR. TULENCIK: We have a trial.

19 MR. MASON: We have a trial with the National
20 Relations Board on the 6th. I can ask the ORB if they'll
21 kick the trial. I'm not sure they will.

22 THE COURT: No. It's possible that we could go on
23 the 2nd. That's assuming that Throckmorton only lasts
24 three days. I could also do the afternoon -- I could
25 possibly do the afternoon of the 3rd or the late morning.

1 How long will your case in chief last at the PI
2 hearing?

3 MR. MASON: Are we going to roll the preliminary
4 into permanent and just consolidate to a single hearing?

5 THE COURT: I don't know. You can tell me whether
6 you want it to be a trial on the merits.

7 MR. MASON: I mean, we're willing to do that and
8 roll the whole thing in and just be -- put the whole thing
9 together. And it would probably be about a day, day and a
10 half of, you know, the testimony from the various
11 individuals. And if we can set that like for May 14, if we
12 get an agreement from all parties that that would be the
13 date to go. I don't know how much time the other side
14 needs to put theirs on.

15 MR. BARCH: I don't know if we can put together a
16 whole trial on the merits by that time.

17 THE COURT: Let's keep it to a preliminary
18 injunction hearing then. How long is it going to take to
19 put on your case?

20 MR. MASON: A couple hours.

21 THE COURT: And you?

22 MR. BARCH: Probably no longer than that.

23 THE COURT: Okay. So we're talking about a full
24 day?

25 MR. BARCH: Yeah.

1 THE COURT: Well, we could provisionally set it for
2 May 2nd, or maybe I could move my -- there's another
3 possibility I can move the stuff that I have in the
4 afternoon of May 3rd over to May 2nd.

5 Here's what we'll do. Let's set it for the 2nd.
6 We'll set it for the 2nd. Then, if I'm still in trial --
7 if it looks like I'm going to still be in trial, we can
8 start it perhaps -- even if I'm in trial, I shouldn't be in
9 trial in the afternoon of the 2nd. So worse case scenario,
10 I can start it the afternoon of the 2nd. All that we don't
11 finish, I can continue to the afternoon of the 3rd. So
12 I'll keep my criminal calendar. Throckmorton shouldn't
13 last any more than three-and-a-half days.

14 So count on this to begin on the 2nd, and we will
15 keep you apprised. I'll know certainly not later than the
16 30th or so whether that case that begins on the 29th is
17 going to last longer.

18 MR. BARCH: A question, Your Honor. Just to make
19 sure, do the actual parties have to attend this preliminary
20 hearing?

21 THE COURT: No. The parties don't have -- all I
22 need is your witnesses.

23 MR. BARCH: Okay.

24 THE COURT: I want simultaneous briefing addressing
25 the four prongs of the test for an issuance of a

1 preliminary injunction by close of business on the 26th;
2 reply briefs, if any, by close of business on the 30th.
3 Ten-page limitation on the opening briefs; five-page
4 limitation on the replies.

5 We'll start at 9:30 on May 2nd, unless I indicate
6 otherwise. And assuming that we're going to go at 9:30, I
7 want you here by nine o'clock. I have a nine o'clock
8 conference call. It shouldn't last anymore than 15
9 minutes. But I want everybody here in your places so we
10 can begin promptly at 9:30.

11 Now, are you requesting that the plaintiff post a
12 bond, Mr. Barch?

13 MR. BARCH: Yes, if possible.

14 THE COURT: Well, I'm going to have him post a
15 nominal bond in the amount of -- how much are we talking
16 about in terms of premiums for these four insured
17 gentlemen? Do you have any idea? It's difficult to
18 quantify.

19 MR. ORRAND: I can't say.

20 THE COURT: I'm going to have them post a bond of a
21 thousand dollars. We're only talking about -- we're
22 talking about eight days. So that's a nominal amount.

23 MR. MASON: We appreciate that, Your Honor. If
24 counsel on the other side agrees to waive bond at some
25 point, because it is nominal, would that be okay, too?

1 MR. ORRAND: Excuse me, Your Honor. I think we can
2 waive that in the interest of simplicity.

3 MR. MASON: Thank you. It's just a lot of time. It
4 costs us a hundred dollars for a thousand dollar bond.

5 THE COURT: All right. Is there anything else?

6 MR. MASON: No, sir. Thank you so much.

7 MR. BARCH: Thank you, Your Honor.

8 (Proceedings concluded at 2:40 p.m.)

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C E R T I F I C A T E

I, Shawna J. Evans, do hereby certify that the foregoing is a true and correct transcript of the proceedings before the Honorable Algenon L. Marbley, Judge, in the United States District Court, Southern District of Ohio, Eastern Division, on the date indicated, reported by me in shorthand and transcribed by me or under my supervision.

s/Shawna J. Evans
Shawna J. Evans, RMR
Official Federal Court Reporter